

LIBRARY OF CONGRESS

+ + + + +

COPYRIGHT OFFICE

+ + + + +

COPYRIGHT ARBITRATION ROYALTY PANEL

+ + + + +

In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.
2000-9

CARP DTRA
1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Wednesday
September 12, 2001

The above-entitled matter came on for hearing,
pursuant to notice, at 9:00 a.m.

BEFORE

| | |
|----------------------------------|------------|
| THE HONORABLE ERIC E. VAN LOON | Chairman |
| THE HONORABLE JEFFREY S. GULIN | Arbitrator |
| THE HONORABLE CURTIS E. von KANN | Arbitrator |

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

ORIGINAL

APPEARANCES:

On Behalf of Clear Channel Communications, Inc.,
National Religious Broadcasters Music License
Committee, and Salem Communications Corporation

KARYN ABLIN, ESQ.
BRUCE G. JOSEPH, ESQ.
THOMAS W. KIRBY, ESQ.
DINEEN PASHOUKOS WASYLIK, ESQ.
of: Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-4913
(202) 719-7000

On Behalf of American Federation of Television
and Radio Artists

ARTHUR J. LEVINE, ESQ.
of: Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4032

On Behalf of the Association for Independent
Music

JACQUES M. RIMOKH, ESQ.
BARRY I. SLOTNIK, ESQ.
of: Loeb & Loeb, LLP
345 Park Avenue
New York, New York 10154-0037
(212) 407-4900

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

APPEARANCES: (Cont'd)

On Behalf of BET.com; CBS Broadcasting, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Everstream, Inc.; Incanta, Inc.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.; NetRadio Corporation; Radioactive Media Partners, Inc.; RadioWave.com, Inc.; Entercom Communications Corporation; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network, LLC

ADAM I. COHEN, ESQ.

MARK A. JACOBY, ESQ.

R. BRUCE RICH, ESQ.

FIONA SCHAEFFER, ESQ.

KENNETH L. STEINTHAL, ESQ.

of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8622

On Behalf of AEI Music Network; DMX Music, Inc.

SANDRA M. AISTARS, ESQ.

DAVID R. BERZ, ESQ.

of: Weil, Gotshal & Manges, LLP
1615 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 682-7272

On Behalf of the Recording Industry Association of America, Inc.

JOHN A. FREEDMAN, ESQ.

ROBERT ALAN GARRETT, ESQ.

HADRIAN R. KATZ, ESQ.

BRAD R. NEWBERG, ESQ.

RONALD A. SCHECHTER, ESQ.

JULE L. SIGALL, ESQ.

CHRISTOPHER WINTERS, ESQ.

MICHELE J. WOODS, ESQ.

of: Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5719

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

APPEARANCES: (Cont'd)

On Behalf of Public Radio:

DENISE LEARY, ESQ.
of: Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 513-2049

On Behalf of American Federation of Musicians of
the United States and Canada:

PATRICIA POLACH, ESQ.
of: Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

C-O-N-T-E-N-T-S

WITNESS

DIRECT CROSS REDIRECT RECROSS

Steven Marks

By Mr. Garrett

9472

EXHIBIT NO.

DESCRIPTION

MARK RECD

RIAA

None.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1

P-R-O-C-E-E-D-I-N-G-S

2

WHEREUPON,

3

STEVEN MARKS

4

was recalled for examination and, having been

5

previously duly sworn, resumed the witness stand, was

6

further examined and testified as follows:

7

DIRECT EXAMINATION (continued)

8

BY MR. GARRETT:

9

Q Mr. Marks, let me ask you to turn first to

10

what is marked as 60A. Do you have that before you?

11

A Yes.

12

Q That's the renewal agreement with MMM,

13

correct?

14

A Yes.

15

Q And could you highlight the rates and

16

significant terms in that renewal agreement and

17

explain how they differ, if at all, from the original

18

agreement?

19

A First, I would point out that this

20

agreement covers not only webcasting performance and

21

ephemeral rights, as we had initial agreements with

22

MMM on, but also the business establishment ephemeral,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 which is a business that MMM is now launching or
2 getting into. So there are three different statutory
3 license -- statutory license rights that are covered.

4 And just picking up with the webcasting
5 performance and ephemeral rights, the agreement
6 differs from the previous agreement in the sense that
7 we have dropped the operating expense part of the
8 formula. So the initial agreement was 15 -- the
9 greater of 15 percent of revenues or operating
10 expenses.

11 Looking at page 11, at Section 3.3A, the
12 fee now is the greater of 15 percent of revenues or
13 .25 cents per performance. So we've essentially
14 substituted the .25 cent per performance right for the
15 15 percent of operating expenses as, in essence, a --
16 as part of the formula and part of what we regard as
17 a minimum fee that will ensure value to our members.

18 The webcasting ephemeral is now 10 percent
19 of the performance fee, consistent with our agreements
20 since the time that we initially signed the agreement
21 with MMM. And then the business establishment
22 ephemeral fee is 15 percent of revenues, and there is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 --

2 Q The definition of "business establishment
3 revenues" in Section 1.5?

4 A Yes. Yes. The definition there covers
5 subscription fees collected, including equipment
6 rental fees and maintenance fees for equipment that
7 may exist at the location where the transmissions are
8 being delivered, or to which the transmissions are
9 being delivered, any additional advertising and a
10 number of other things that are consistent with other
11 gross revenue definitions and agreements that we've
12 had previously.

13 One of the issues that arose in this
14 negotiation that is relevant I think to the discussion
15 that the Panel will have with counsel on the 112(e)
16 issue later is, what type of business establishment
17 transmissions were actually covered, and what type
18 weren't.

19 And what we have covered here are
20 transmissions that are made directly from
21 musicmusicmusic to one of its clients for immediate
22 playback. So it's essentially a stream to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 business establishment location for playback at that
2 time, much in the same way that a consumer would
3 receive the stream, except that it's being sent to a
4 business location.

5 MR. RICH: I'm having trouble hearing the
6 witness.

7 THE WITNESS: So that's what's covered by
8 the 112(e) license. And, again, as I said, that's 15
9 percent, and that's in Section 3.3(c).

10 I think with regard to the remainder of
11 the documents there are some changes, mostly in
12 language, to the other types of consideration that we
13 receive in Sections 3.5 through 3.8.

14 CHAIRMAN VAN LOON: Are these significant
15 ones or ones that --

16 THE WITNESS: Well, the one that I know is
17 not there that was in the initial agreement is the
18 links to the copyright owner sites. And as we
19 discussed on Monday, that was something that we
20 dropped after the first couple of agreements for the
21 reasons I explained then. So that's no longer there,
22 but --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 ARBITRATOR VON KANN: So this has been
2 dropped in the renewal.

3 THE WITNESS: Yes. But the public service
4 announcements, the buy button links, the surveys, and
5 other reports, are all still there.

6 BY MR. GARRETT:

7 Q And this agreement also allows MMM to
8 transmit sound recordings to other websites, correct?

9 A Yes. I think it has a syndication
10 component and --

11 Q And that's different from the original
12 agreement, correct?

13 A Yes, that's right.

14 Q All right. And the fee for that is in
15 3.3(a)?

16 A I believe so.

17 Q And that's .3 cents, correct?

18 A Yes. It's in the middle. I just had
19 trouble finding exactly where it was, but it's about
20 a third of the way down in 3.3(a). It says "plus .3
21 cents for each website performance accessed through
22 syndicated websites."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q And this also has the long song surcharge
2 that we discussed earlier?

3 A Yes, the same formula for the long song.

4 Q Okay.

5 ARBITRATOR GULIN: Where would I find the
6 definition you gave for a business establishment,
7 ephemeral?

8 THE WITNESS: I believe it's in Section
9 1.7, covered business establishment.

10 CHAIRMAN VAN LOON: 1.7?

11 THE WITNESS: Which is on page 3. The
12 distinction that was being made here was between a
13 service that makes transmissions directly to the store
14 and one that delivers music to a hard drive at the
15 store that then can be used to -- for playback later.
16 And that hard drive can be updated from time to time.

17 That's something that -- that's a type of
18 service that we don't believe falls within the Section
19 112 statutory license. It's a different type of
20 service.

21 So the -- if you think of it in terms of,
22 you know, one is more like a broadcast model, and the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 other is just an entirely different type of service.

2 ARBITRATOR GULIN: I understand the
3 distinction you're trying to make. I'm just trying to
4 see what language in here says that.

5 THE WITNESS: In 1.7 it says "that
6 receives digital audio transmissions directly from
7 licensee for immediate playback and use in the
8 ordinary course of its premises." That would differ
9 from a situation where music was being transmitted or
10 sent to a box --

11 ARBITRATOR GULIN: Okay.

12 THE WITNESS: -- for playback at some
13 other time and having songs updated and deleted and
14 added to that box. I think those are the principal
15 things in MMM.

16 BY MR. GARRETT:

17 Q Let me ask you to turn to Number 62A.

18 A Yes.

19 Q And 62A is the renewal with
20 Radiofreeworld, correct?

21 A Yes.

22 Q And could you explain how the rates and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 terms in that agreement -- in that renewal agreement
2 differ from the original agreement?

3 A I think the only significant change -- the
4 rate is the same, the .4 cents. One change -- I know
5 the minimum performance fee was dropped to \$500, and
6 that was a result of the fact that Radiofreeworld, as
7 it turned out, was not using, because it was more of
8 an eclectic and world music station, was not using a
9 lot of our members' repertoire. So we dropped the
10 minimum fee for that reason.

11 And the remainder of the agreement I
12 believe is similar in most substantive respects,
13 subject to updating a number of the provisions as they
14 had been updated since the time that we did the
15 original agreement.

16 Q Let me ask you to turn to 63A.

17 A Yes.

18 Q That's the renewal with iJockey, correct?

19 A Yes.

20 Q Can you explain how that agreement differs
21 from the original agreement?

22 A In the original iJockey agreement, we had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 per performance rates that started at .2 cents and
2 went up to .5 cents, depending on the number of
3 performances that were made.

4 In Section 1.14, you can see in the
5 payable performance rate that the rate is now .3 cents
6 for the first six months, and then .35 cents
7 thereafter. And the reason we -- we kept the
8 introductory rate was because iJockey has not yet
9 launched, so they've never really taken advantage of
10 any kind of introductory rate.

11 So the idea was they should get the lower
12 rate or -- I mean, this is something they negotiated,
13 obviously -- to get a lower rate for the first six
14 months of their streaming, and then the rate would go
15 up to .35 cents.

16 I believe another change -- what we've
17 begun to do recently in our agreements is to receive
18 a payment upon signing, and this is to help cover the
19 costs that are incurred in just drafting the
20 agreement, if nothing else, and the time spent.

21 So, for example, you know, we spent some
22 time with iJockey initially, because they hadn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 launched, we hadn't seen any payment on that, we want
2 to ensure that -- not only that we're dealing with --
3 in iJockey's case we were dealing with somebody
4 serious, but in other cases that enables us to -- to
5 ensure that the person is serious about the business.

6 So we have -- they made an initial payment
7 of \$2,500 that was non-refundable. So even if they
8 never launch, that was a payment they made.

9 ARBITRATOR VON KANN: Where is that
10 reference?

11 THE WITNESS: That is in Section 3.1, on
12 page 6.

13 I believe -- I know there were a number of
14 other items that were negotiated in this renewal, but
15 I believe I can make the general statement that most
16 everything that was in the first agreement is still
17 here in terms of other consideration.

18 Some of the language may have changed. I
19 mean, I'd really have to go back and compare them side
20 by side, which I don't think we want to take the time
21 to do now, but --

22 BY MR. GARRETT:

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q Do you know when that agreement was
2 finally executed?

3 A The date on it is February 1st. What we
4 did in a few cases, for the agreements that expired
5 December 31st of 2000, we might have done a one-page
6 extension -- I'm sorry -- yes, a one-page extension
7 for 30 days, just to give us time to continue to
8 negotiate. So that's why the -- this is February 1st.
9 That accounts for the 30-day gap.

10 Q Okay. Do you know when it was actually
11 executed as to when -- what the effective date was?

12 A No, not -- I can't recall off the top of
13 my head. That's not apparent to me from the
14 agreement.

15 Q Would it have been after February 1st?

16 A It's likely that it was after -- it may
17 have been after February 1st.

18 MR. RICH: Can't hear.

19 THE WITNESS: It's likely that it may have
20 been after February 1st.

21 BY MR. GARRETT:

22 Q All right. Let me ask you to turn to 70A,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 which is entitled "Assignment and Assumption Agreement
2 and Amendment Number 1" to the Multicast agreement.
3 Just explain the relationship between that document
4 and the original Multicast agreement.

5 A This, obviously, was a short form renewal
6 for an additional year. I believe what we did -- it
7 may help to look at the original agreement. There was
8 a change in the minimum fee from -- to the year one
9 minimum amount.

10 I'm sorry. Multicast launched later in
11 the year than they had initially thought. So we
12 signed the agreement in April of 2000. I think they
13 launched four to six months after that. And I believe
14 the minimum fee in that agreement was \$10,000 -- was
15 \$10,000, so we agreed to reduce that to \$5,000, which
16 they paid us instead, and that was an accommodation to
17 them because of the fact that they have launched later
18 in the year than they had anticipated.

19 CHAIRMAN VAN LOON: There was a request
20 from the rear that the witness keep his voice up.
21 They cannot hear in the rear, and that's about the
22 third or fourth one, so we're going to have to exhort

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 both of you, again, to speak loudly enough that the
2 whole room can hear.

3 THE WITNESS: The year two minimum is
4 \$10,000, and the fees are otherwise the same. So the
5 only -- the only real change to the agreement was in
6 the minimum fee, and that was an accommodation we made
7 dropping it from 10 to five.

8 MR. GARRETT: I have nothing further.

9 CHAIRMAN VAN LOON: Excellent. That will
10 conclude his direct, unless the Panel has questions.

11 ARBITRATOR VON KANN: Yes. Let me ask you
12 one thing about these renewals. Just quickly looking
13 through and --

14 CHAIRMAN VAN LOON: I have to ask you to
15 keep your voice up also, please.

16 (Laughter.)

17 ARBITRATOR VON KANN: It's obvious that
18 there are somewhat different rates here. I mean,
19 we've got -- we've got RadioMoi getting .25 cents.
20 We've got iJockey getting .35. We've got somebody
21 else getting .4. There are some variations. Can you
22 tell me why?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 THE WITNESS: Yes. The .25 rate in the
2 RadioMoi agreement is really more of a minimum. It's
3 -- they're paying us 15 percent of revenues, and that
4 we -- we added in a per performance minimum. So when
5 we are thinking in terms of -- we're getting the up
6 side. I mean, it's at least .25 cents. It may be
7 something much greater than that, which is 15 percent
8 of their revenues.

9 In both Radiofreeworld and iJockey, it's
10 a straight per performance rate, and so there's the
11 .35 and the .4, and that was just a matter of
12 negotiation.

13 ARBITRATOR VON KANN: And sort of a
14 related question, my understanding is that RIAA did
15 not -- I think you said in your direct testimony that
16 at one point there was some discussion about perhaps
17 sitting down with some webcaster to talk about an
18 agreement. I forgot which one. And you could sort of
19 describe for them the general provisions or the
20 general kinds of things that you had done for other
21 people, I think you said.

22 But the impression I got was not specific

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 rates. This is sort of the kind of agreement that
2 we're entering into.

3 The impression that's come to me is that
4 your approach in this was that you had a -- you didn't
5 have an absolute form contract that was identically
6 applied to everybody, but you had rather similar
7 provisions that you were trying to get, but you didn't
8 tell the individual licensees what other licensees
9 were getting, I guess, for obvious reasons. Is that
10 right?

11 THE WITNESS: Yes and no. We never told
12 anybody that we were negotiating with "this licensee
13 is paying this."

14 ARBITRATOR VON KANN: Okay.

15 THE WITNESS: What we did tell them was,
16 "For our per performance rates, this is the range of
17 rates that we're getting." And we always -- I mean,
18 we thought .4 cents was the right number, and that's
19 where we started. To the extent that there are
20 agreements that are below that, they were negotiated
21 down, and that was just part of the negotiations.

22 ARBITRATOR VON KANN: I guess my question

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is: to what extent did the word get around from one
2 licensee to another that, for example, in these
3 renewals did people say, "Well, I hear RadioMoi got
4 this deal," or "I hear iJockey got that one"?

5 THE WITNESS: No. We did not have anybody
6 do that. I think all of the licensees regarded their
7 agreements as confidential, just like they regard I
8 think every other business agreement that they do,
9 with either vendors or whoever it might be.

10 ARBITRATOR VON KANN: Thank you. Okay.
11 Thank you.

12 THE WITNESS: Can I just add one thing to
13 that? You mentioned a form agreement.

14 ARBITRATOR VON KANN: Right.

15 THE WITNESS: We actually have been
16 developing a form agreement, and we have a form
17 agreement. The reason that the agreements look
18 different is that whenever we put that form in front
19 of somebody after we've negotiated the business terms
20 and plugged those into the form is that we have to
21 engage in some negotiations.

22 Different people demand changes to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 different parts of the form. We've never been able to
2 say to somebody, "Take it or leave it," because that's
3 not the -- the leverage we've had in negotiations.

4 So there have always been, in every
5 negotiation, different webcasters or potential
6 licensees or licensees which focus on different things
7 that were more or less important to them, and we'd
8 have to negotiate changes in language or other
9 substantive changes to it.

10 ARBITRATOR VON KANN: All right. Thank
11 you.

12 CHAIRMAN VAN LOON: Mr. Steinthal?

13 (Whereupon, at 10:44 a.m., the proceedings
14 went into Open Session.)
15
16
17
18
19
20
21
22

CERTIFICATE

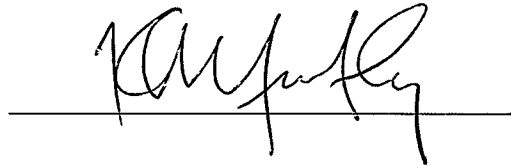
This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: September 12, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



1 CROSS EXAMINATION (continued)

2 BY MR. STEINTHAL:

3 Q Good morning, Mr. Marks.

4 A Good morning.

5 Q Yesterday we talked a bit about the
6 process that the RIAA Negotiating Committee followed,
7 and what your role was in that process. Do you recall
8 that?

9 A Yes.

10 Q And I think you talked about the
11 considerations that led to the adoption of the 15 to
12 20 percent percentage of revenue range, and the four-
13 tenths of a cent per performance, sort of goals that
14 were set by the committee. And I just want to bring
15 us back a little bit to what we talked about yesterday
16 as a springboard to where we're going to go today. Do
17 you recall generally covering that yesterday?

18 A Yes.

19 Q And then we talked about DiMA and the
20 negotiations or discussions you had with them, right?

21 A Yes.

22 Q Now, in your direct testimony, both in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 writing and the other day, in answering Mr. Garrett's
2 questions, you testified that webcasters actually had
3 disincentives to doing an RIAA license, correct?

4 A Yes.

5 Q I think we started to talk about that just
6 at the very end yesterday. And since I want to focus
7 on that a little bit, I want to come back to it now
8 and follow through with it. I think you said that
9 there were two factors that led to the disincentives.
10 One was the ability to sit back and wait for a CARP
11 determination, and the other was, sort of part of
12 that, the ability to not pay until the CARP rate was
13 set, right?

14 A Well, one was the fact that they could
15 secure the content and have the content without
16 agreeing to anything. And in many circumstances, they
17 were very focused on, okay, we've secured the content,
18 we've got that, let's move on and look at the other
19 parts of our business that we need to focus on in
20 order to build this as an attractive website and a
21 successful one.

22 So one was -- the mere fact that you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 could, with this one page, get the content you want
2 and not have to deal with -- with anything else, not
3 do anything else. And knowing, of course, that you
4 would be paying a rate that was either the product of
5 an industry negotiation or a CARP at some point later.

6 And then the second one was I think that
7 fact of, well, gee, why should I pay now if I can wait
8 and I don't -- I may not have a lot of money right now
9 to pay, or even if I do I'd rather put it into other
10 parts of my business.

11 CHAIRMAN VAN LOON: Excuse me. We're in
12 closed session.

13 MR. STEINTHAL: We're back open. We can
14 open it up.

15 CHAIRMAN VAN LOON: I see. So we were in
16 closed session, and we go back to open when we --

17 MR. STEINTHAL: From the beginning of
18 cross, I'm sorry.

19 CHAIRMAN VAN LOON: -- from the beginning
20 of cross, yes.

21 THE WITNESS: So the second was the fact
22 that there was no payment that would be necessary. In

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 some cases, a webcaster might say, "Heck, if I'm
2 successful two years from now, that's great, I'll pay
3 it. If not, I've got the content; I'll never pay
4 anything." So it was -- may have been a win-win for
5 them in that respect. But those were the two primary
6 items.

7 BY MR. STEINTHAL:

8 Q But you don't deny, do you, that there
9 were benefits to at least some broadcasters and
10 webcasters in reaching a voluntary license with the
11 RIAA?

12 A Those are things that you'd have to ask
13 the webcasters. I mean, I -- we could offer one
14 thing, that was rights pursuant to the statutory
15 license.

16 Q Well, but if there were just disincentives
17 and no benefits, why would anybody do it?

18 A Well, I think that there -- I thought you
19 were asking specific questions for specific
20 webcasters. I mean, we put two things up on our
21 website that we thought might attract people just to
22 get them to the table, and that was the hardest part

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 we had was to actually just get people to the table.

2 And one thing that we had in that FAQ was
3 pointing out that you achieve some certainty by doing
4 a deal now. And the second was that you have the fate
5 -- your fate in your own hands, in terms of
6 negotiating the best rate that you thought you could
7 negotiate and was fair for your business, and also
8 maybe structuring an agreement that was different than
9 what might come out in the arbitration. That might,
10 you know, those are -- those were two things that we
11 put up on the website.

12 Q As benefits or incentives to the
13 webcasters in doing a deal with the RIAA, right?

14 A As an incentive to get people to the
15 table, yes.

16 Q Okay. And you heard from many of the
17 webcasters that you had conversations with that
18 economic certainty was important to them, wasn't it?

19 A We certainly had some people with whom we
20 negotiated say that they thought certainty was a good
21 thing.

22 Q And you are aware, are you not, that some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 webcasters during the period 1999 through the present
2 day have been in the market seeking to raise capital
3 for their ventures, right?

4 A Many are.

5 Q And you were made aware, were you not, by
6 some of the webcasters you were talking with that a
7 significant issue facing companies seeking equity
8 funding was the avoidance of uncertainty regarding
9 their intellectual property rights obligations?

10 A I never had a discussion with somebody
11 about their private discussions with venture
12 capitalists or others who might be providing
13 investment capital to them. So I can't say
14 specifically that X webcaster said to me, "We need
15 this because of this," or "We'd like this because of
16 this."

17 Q Are you going to dispute the notion that
18 in discussions with webcasters some of them said to
19 you that they were in the midst of discussions with
20 potential investors in their company, and that
21 obtaining certainty in terms of the licensing
22 requirements and obligations was something that was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 important to them because they were discussing that
2 with their investors?

3 A I'm just saying to you that I can't recall
4 a specific webcaster telling that, you know, with --
5 this at a specific time. We certainly knew that
6 people we were negotiating with, just like a lot of
7 other people in industry, were seeking to attract
8 capital. There's no question about that.

9 Q And didn't you know as well that some of
10 the companies you were dealing with -- let me rephrase
11 it. Didn't you have the understanding, whether or not
12 somebody directly told you they needed it for investor
13 X, didn't you have the understanding that one of the
14 reasons certain companies were seeking to get an RIAA
15 license was to fix the amount of its obligations for
16 content?

17 A I'm not trying to be evasive here, but I
18 -- I -- there is nobody who came to -- to us and said,
19 "We need this because X person is going to invest in
20 us next week, but they won't do it without this RIAA
21 license." I can't recall anybody ever saying that to
22 us in a negotiation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q And you never had the understanding that
2 it was important to potential webcasters that they
3 secure a license because of their ongoing talks with
4 investors, is that your testimony?

5 A I guess what I'm quibbling with is that
6 I'm not sure it was so causal. We certainly
7 understood that that was something that might be good
8 for the webcaster, but nobody made that causal
9 connection to us and said, "We've got to get this, so
10 we can get this."

11 Q Let me ask you this. Assuming that an
12 entity is looking at a multi-million dollar potential
13 investment by a venture capital company, isn't it true
14 that the investor will typically want to know what the
15 cost structure is of the entity that it's potentially
16 investing in?

17 A I'm not -- I'm not a VC. I don't invest
18 in companies. That's -- I honestly don't feel
19 qualified to answer that.

20 Q Let me ask you this. Isn't it true that
21 if there is some uncertainty about whether a given
22 webcaster's functionality qualifies for a statutory

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 license, that a webcaster is likely to face greater
2 obstacles in raising equity than another webcaster
3 whose eligibility for the compulsory license is not in
4 question?

5 A I don't know that. I'm not a -- again,
6 I'm not somebody who has been in the VC markets. I
7 never had a discussion with a webcaster that was
8 related in that way, so I can't give you that answer.

9 Q Is it your testimony that none of the
10 webcasters you had discussions with told you that it
11 was important for them to resolve the issue of
12 questions about their eligibility for the compulsory
13 license because of potential investors who needed to
14 have some certainty about that?

15 A I'm just trying to tick through each of
16 our licensees to see when that could have been an
17 issue. I mean, we didn't have issues of eligibility
18 with any of our licensees that were directly related
19 to the negotiations. So --

20 Q You say that were directly related to the
21 negotiations. Isn't it true, Mr. Marks, that -- let's
22 pick the area of syndicating to entertainment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 websites. Didn't the issue of whether or not a
2 webcaster could qualify for a compulsory license, if
3 it was going to syndicate content to an entertainment
4 website, come up in your discussions?

5 A Yes. That issue came up.

6 Q And weren't certain licensees concerned
7 about resolving that uncertainty in a manner whereby
8 they could get a license from the RIAA so there would
9 be no uncertainty?

10 A That I -- no, I don't think that that's
11 the case. I mean, we didn't have any -- we've only
12 got syndication licenses with a few companies. And if
13 anything, the fact that we had licensed WWW initially,
14 and they were engaging in that kind of a business,
15 should have been an indication to anybody that came
16 later that we could -- that fell under the statutory
17 license, because that's the only kind of license we
18 could offer.

19 Q So your testimony to the Panel right now
20 is the issue of eligibility and uncertainty as to
21 eligibility for people that wanted to syndicate to an
22 entertainment website was never an issue that came up

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in discussions with potential webcasters?

2 A Well, it was an issue in the negotiations
3 in terms of what the rates should be. I don't recall
4 anybody coming to us and saying, "We are unsure about
5 whether we can do this." To the extent that they came
6 to us, it was a -- the answer was, yes, you could do
7 it. I mean, we had already licensed somebody to do
8 that, so there wasn't -- there was never a debate
9 about, well, is this in, is it out, let's sit down and
10 figure out, you know, whether it is or it isn't.

11 Q So your testimony is as simple as that, it
12 never came up in the context of eligibility for
13 syndicating to an entertainment website.

14 A I'm not saying that it didn't come up in
15 terms of whether it was eligible or not. I'm just
16 saying there was never a question about it, because to
17 the extent that somebody might have raised that issue
18 -- and the only two companies I believe that would
19 have raised that would have been Websound or Spike
20 Radio.

21 Our response was, yes, these are under
22 these terms. So it wasn't -- there wasn't a debate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 about them saying, "Well, we think it's in," and us
2 saying, "No, we don't think it is. But if we sit
3 down, you know, we can try and figure it out." We had
4 a clear thought about what was in and what was out and
5 what rates and terms should apply.

6 Q We'll come back to those documents as we
7 go through them and examine them in some more detail
8 on the closed record.

9 What about the issue of interactivity?
10 There were times, were there not, whether it be with
11 Moodlogic or Kick Radio or Music Match, where
12 questions about whether their functionality was such
13 that it qualified for the compulsory license was
14 definitely something you talked to them about, right?

15 A What were the companies you named again?

16 Q Moodlogic, Kick Radio, Music Match. Maybe
17 even iJockey.

18 A Can you just ask the question again? I
19 just want to --

20 Q Well, the question is --

21 A -- make sure I answer it --

22 Q -- didn't the question of whether their

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 services and the functionalities they had at the time
2 they were in discussions with you at the outset would
3 qualify for the compulsory license?

4 A That is -- it's probably easiest to answer
5 them one by one.

6 Q Okay.

7 A So just starting with Music Match, for
8 example, we were negotiating with them for a long
9 period of time. We had questions initially about how
10 their system worked.

11 We had, in fact, a meeting between some of
12 their representatives and our representatives late in
13 2000. We were comfortable, based on that meeting,
14 about how the system worked, or at least what their
15 explanation was in moving forward with discussions.
16 So there was not -- it was more of a let's make sure
17 we understand how this thing works, and then we move
18 forward with discussions.

19 Later, when they launched their
20 subscription service, we had concerns about how that
21 -- the functionality in the subscription service, and
22 that's what led to all of the other things that I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 discussed I guess on Monday about the CARP filings,
2 their deck action, and our responding infringement
3 action.

4 Q And without getting into a restricted
5 area, you don't dispute the notion that at some point
6 with Music Match the RIAA's position was the
7 functionality they were offering was a functionality
8 that you had concerned about as qualifying for the
9 statutory license, right?

10 A I'd agree with that statement as --
11 certainly as it relates to the subscription service.

12 Q Why would it be any different between a
13 subscription service and a non-subscription service?

14 A It's not -- there's no --

15 Q Okay.

16 A -- there's no magic to it. It's just that
17 their subscription -- when they launched that
18 subscription service was -- the functionality that was
19 part of that was what caused the concern.

20 Q And with respect to Moodlogic and Kick
21 Radio, which we'll come back to in some detail later,
22 isn't it true that when they first came to you with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 their functionalities that they contemplated launching
2 you had concerns about whether the functionalities
3 they had in mind would qualify for the statutory
4 license?

5 MR. GARRETT: Couldn't we just take these
6 one at a time?

7 MR. STEINTHAL: We can do it separately,
8 if you'd like.

9 THE WITNESS: Yes. With regard to
10 Moodlogic, I honestly can't recall that. We may have
11 had discussions based on the proprietary technology
12 they have about how it worked. But I don't think it's
13 fair to say we had concerns based on an understanding
14 of what the system was.

15 I think that during our negotiations the
16 issue may have came up, but the initial discussions I
17 had with Moodlogic were me meeting in a hotel lobby
18 with Tom Sulzer and Mark Mithys, just about, you know,
19 are you interested in negotiating a deal.

20 There was no discussion at that meeting
21 about, you know, us raising concerns about, well,
22 we've heard your system might work this way. And then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 they responded, yes, we're interested, and we began
2 licensing discussions.

3 It's possible that during those
4 discussions, as we do with every company, try to learn
5 about what exactly they're offering. And we have a
6 discussion with them on that.

7 With Kick Radio, Kick Radio was offering
8 a unique service that conceptually certainly fit in
9 the statutory license. We just had to -- we -- what
10 we told them was we wanted to build in some
11 safeguards, so that it didn't turn into a personalized
12 services, which wasn't their intent.

13 So we had discussions as part of the
14 negotiations over, can we just put in this kind of
15 safeguard and that kind of safeguard, so this doesn't
16 turn into something that neither of us want it to turn
17 into.

18 So it wasn't as if we read about their
19 service, we contacted them, and we said, "We've got
20 real concerns about this." Kick Radio contacted us.
21 I had a meeting with Matt Hackett, who is the
22 principal, and he told us the kind of service, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 conceptually it sounded great, and -- and we followed
2 up in negotiations on the statutory license agreement
3 that we did.

4 And as part of that process, we just built
5 in safeguards to, again, ensure that it didn't turn
6 into a personalized service, which wasn't their
7 intent.

8 BY MR. STEINTHAL:

9 Q But you would agree with me, yes or no,
10 that with respect to both Moodlogic and Kick Radio the
11 subject of limitations on the service to make sure
12 they weren't personalized was a subject you discussed
13 in the course of the negotiations, right?

14 A Yes, with Kick Radio. I just honestly
15 can't recall with Moodlogic. I would say it's
16 possible, but I honestly can't recall.

17 Q Now, would you agree with the following
18 proposition, Mr. Marks? If you were a webcaster, and
19 there was any uncertainty about whether you qualified
20 for the statutory license, whether it be because of
21 syndicating to entertainment websites or because of
22 potentially personalized features that would take you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 outside of the license, if you had that uncertainty,
2 wouldn't that give you an incentive to resolve that
3 uncertainty in favor of making sure that you had a
4 license and were not infringing, compared to a run-of-
5 the-mill webcaster that had no personalization
6 features, or didn't syndicate to entertainment
7 websites?

8 A That is certainly not my experience in the
9 marketplace. Launch never did that with us. MTV
10 never did that with us. Lycos, which launched a
11 service that had a next and a rewind button, never did
12 that with us. Most of the services that we had that
13 we might have had a concern about never contacted us
14 about doing a deal in order to sit down and try and
15 talk about those issues and resolve them. So that is
16 definitely not my experience in the marketplace.

17 Q So you're going to sit here and say that
18 a webcaster, even facing uncertainty about qualifying
19 for the compulsory license, is in no different
20 circumstance in terms of its incentives to get a
21 statutory license from the RIAA --

22 A All I'm --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Q -- anyone has got no uncertainty about it?

2 A All I'm saying is I can't draw that
3 conclusion from my experience in the marketplace,
4 because that's not what happened. There were more
5 companies that had issues on, for example, the
6 personalized issue.

7 I think if we took the seven that were at
8 issue in this arbitration -- Launch, MTV, XACT,
9 Encanta, Music Match, Echo -- you may be able to help
10 me with the seventh. I can't remember who the seventh
11 was, but --

12 Q Listen?

13 A And Listen. Of those companies, only
14 Music Match -- MTV, Launch, Echo, XACT, Listen, and
15 Encanta -- none of them approached us to sit down and
16 do a statutory license deal that covered that part of
17 their service in order to resolve it.

18 Q You're going to sit here and say that MTV
19 never had a discussion with you?

20 A No. We had a discussion with them, but
21 not -- the statutory license discussions we had with
22 them did not cover that part of their service. We had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 discussions with them in the --

2 Q You can sit here and under oath say that
3 you didn't have a conversation --

4 MR. GARRETT: Let him finish.

5 CHAIRMAN VAN LOON: Please let the witness
6 finish.

7 BY MR. STEINTHAL:

8 Q Okay. Go ahead.

9 A In the fall of 1999, we had discussions
10 with MTV, and those discussions did not include the
11 part of their service that was personalized. We were
12 talking just about the preprogram channels.

13 Q And that was at your choice, right?
14 Because you didn't think they qualified, right?

15 A We had, basically, an agreement to
16 disagree over that issue at that point --

17 Q And your point was --

18 A -- because --

19 Q Let me ask a question.

20 MR. GARRETT: Hold on a second. Let him
21 finish. He asked a question; let the witness finish
22 his answer.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 THE WITNESS: Yes. At that time, MTV was
2 talking with our companies individually about that.
3 They did their deal with Warner at about that time,
4 and we basically said, "You go figure this out with
5 the companies in whatever way you can figure it out."

6 There were -- we had discussions with them
7 saying, "We think you need individual licenses for
8 this, certainly," at that time, but they were not part
9 of the statutory license discussions at that time.
10 And I thought -- I think that that's what your
11 question was to me.

12 BY MR. STEINTHAL:

13 Q You just gave testimony giving the
14 impression that the marketplace told you that there
15 was no greater incentive on the part of companies that
16 had some uncertainty to get a statutory license
17 because people didn't come to you and ask for a
18 license. Isn't that the impression you were trying to
19 give in your last answer?

20 MR. GARRETT: Object to the form of the
21 question.

22 MR. STEINTHAL: Just yes or no. There's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 nothing wrong with that question.

2 MR. GARRETT: I object to the form of the
3 question. It mischaracterizes the witness' testimony.

4 ARBITRATOR VON KANN: The question was the
5 thrust of his last answer, whether companies who had
6 some concern about their interactivity sought him out
7 for a license to resolve that? Is that essentially
8 what you're asking?

9 MR. STEINTHAL: I'll take that.

10 THE WITNESS: Yes. And I think my answer
11 to that was I couldn't draw that conclusion based on
12 my experience in the marketplace.

13 BY MR. STEINTHAL:

14 Q Okay. Now --

15 A Yes. Okay. I'll leave it at that.

16 Q The fact is, in 1999, you just testified
17 that you had an agreement to disagree with MTV insofar
18 as your position. The RIAA position was as far as
19 your consumer influence services are concerned, I
20 can't talk to you. I don't want to talk to you. You
21 go talk to the individual companies. Right?

22 A That was the position at some point. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 mean, you're jumping a little bit ahead
2 chronologically, but basically yes.

3 Q And that was the position as to Launch as
4 well, right?

5 A No, we never had discussions with Launch.

6 Q Wasn't it RIAA's position that Launch fell
7 outside the statutory license, and, therefore, you
8 wouldn't talk to them? You, the RIAA, wouldn't talk
9 to them about a license for its consumer-influenced
10 services?

11 A Launch never contacted us. We had no
12 position. We didn't publish a position on anything.
13 We never even had a discussion with Launch. That
14 position may have been made known to Launch through
15 our individual companies who had relationships and
16 discussions with them that they felt that they needed
17 an individual license for this.

18 But all I was saying before was that
19 nobody -- that those companies didn't contact us
20 saying, "Let's sit down and figure out a license and
21 resolve this uncertainty we have."

22 Q Mr. Marks, didn't you publicly at the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 various seminars that you talked about in your
2 background in speaking at, didn't you publicly take
3 the position that services like Launch and MTVi's
4 RadioSonicNet did not qualify for the statutory
5 license?

6 A We took the position publicly that
7 personalized services did not qualify. I don't
8 believe I ever gave a specific example at any public
9 discussion.

10 Q So now let me get this right. If I'm a
11 personalized service, like Launch and RadioSonicNet,
12 or Listen in your view at that time, if I'm a
13 personalized service and I read that that's the RIAA's
14 position, why would I be calling you to try to get a
15 license when you've already taken the position that
16 you don't qualify?

17 A I don't know the answer to that. You'd
18 have to ask, you know, that company.

19 Q So you don't want the Panel to conclude
20 that merely because those services didn't call you
21 about the uncertainty created by the RIAA's position
22 that their personalization features took them outside

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the statutory license? You don't want the Panel to
2 conclude that their failure to call you was some
3 indication that the marketplace demonstrated that
4 there was no greater uncertainty as to those
5 webcasters in terms of getting licenses for their
6 content than a plain vanilla service like Net Radio?

7 MR. GARRETT: I'll object as to form.
8 There were two questions there. Which one does he
9 want the witness to answer?

10 MR. STEINTHAL: I think it's only one, but
11 I think he understands what I'm asking.

12 THE WITNESS: I actually -- I didn't
13 understand, honestly.

14 CHAIRMAN VAN LOON: Could you please --

15 MR. STEINTHAL: Yes, I'll rephrase it.

16 ARBITRATOR VON KANN: It was pretty long.

17 CHAIRMAN VAN LOON: -- break it down into
18 pieces?

19 MR. STEINTHAL: All right.

20 ARBITRATOR VON KANN: Hemingway is good.

21 MR. STEINTHAL: All right. I --

22 MR. GARRETT: When you get to James Joyce

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is when I get --

2 (Laughter.)

3 BY MR. STEINTHAL:

4 Q When you talked before about the
5 marketplace not showing you that there was any greater
6 incentive on the part of a personalized service, or a
7 service as to which there is some question as to
8 eligibility, what were you suggesting to the Panel by
9 what the marketplace told you about that?

10 A Okay. You asked me whether there was an
11 incentive for people to -- who had uncertainty about
12 personalized services to come to us to do a license.
13 And all I was responding -- I was responding to that
14 by saying that was not our experience in the
15 marketplace.

16 People were not coming to us saying,
17 "Let's sit down and do a deal and resolve -- we've got
18 some uncertainty. We think you might have a different
19 opinion as to this legal issue than we do. Let's sit
20 down and do a license about it." That's not what
21 happened in the normal course of things.

22 Q And that was during a timeframe when, as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you said, the RIAA publicly had taken the position
2 that personalized services fell outside the statute,
3 right?

4 A Not necessarily. I don't know -- it's a
5 service-by-service issue. I don't know when a service
6 -- a particular service may have launched in 1999, and
7 we may have taken that position publicly, you know, in
8 2000 or something. So it may or may not be, depending
9 on the service.

10 Q And, indeed, you did take that position
11 publicly in a rulemaking before the Copyright Office,
12 did you not?

13 A Yes.

14 Q And that was in the year 2000, right?

15 A Correct.

16 Q And the RIAA publicly took the position
17 that personalization features, including a skip
18 feature, took services outside the scope of the
19 compulsory license, did you not?

20 A The gist of our filings in that case was
21 that the Copyright Office shouldn't be determining
22 which services are in and which services are out,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 because we felt that that was a case-by-case
2 situation.

3 We -- I don't recall exactly what we said
4 in terms of, yes, we think personalized services are
5 out. That's a pretty obviously thing to say, since,
6 you know, they are essentially. And it's just a
7 matter of, you know, what the facts are for a
8 particular service, which is why we took the position
9 that the Copyright Office ultimately agreed to, that
10 this isn't something that was appropriate for a
11 rulemaking.

12 CHAIRMAN VAN LOON: Do you recall what
13 month your filing was?

14 THE WITNESS: I believe DiMA made the
15 initial filing for a rulemaking -- to commence a
16 rulemaking that would have the Copyright Office adopt
17 regulations that included the definition which -- with
18 which we disagreed.

19 And we made a responsive filing to that
20 petition for a rulemaking, saying that this -- in
21 essence, this entire issue of personalization is just
22 not something that fits neatly within what you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 normally expect a rulemaking proceeding to cover,
2 because it really is a case-by-case issue, and that
3 the marketplace or, if necessary, the courts would
4 figure that out on a case-by-case basis.

5 CHAIRMAN VAN LOON: And my question was
6 whether you recall --

7 THE WITNESS: Oh, I'm sorry.

8 CHAIRMAN VAN LOON: -- which month.

9 THE WITNESS: We would have filed in July
10 or August of 2000. I might stand to be corrected on
11 that being shown the document, but it was in -- in
12 that time range.

13 BY MR. STEINTHAL:

14 Q Well, you recall that the rulemaking was
15 two things. One was a request by DiMA to have the
16 Copyright Office issue a rule that the RIAA's publicly
17 stated position that any degree of consumer influence
18 rendered a service interactive was not the law, and it
19 was only the second part where they said, "And, in
20 addition, we could use a rulemaking that set certain
21 guidelines for what is and isn't interactive." It's
22 two-pronged, wasn't it?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A I do not know what DiMA said in their
2 filing. I can tell you that we never took that
3 position publicly. They may have taken -- thought
4 that that was our position and had a misunderstanding
5 of it, and that may have been, indeed, what they had
6 in their filing. But that was not our public
7 position.

8 Q Well, let's not debate what the filings
9 say. We can come back to that. After the Copyright
10 Office's determination which talked about the fact
11 that there is no hard-and-fast rule as to
12 personalization -- you'd agree with me on that, right,
13 that the Copyright Office said that there's no bright
14 line with respect to where along the spectrum a
15 service goes from being non-interactive to
16 interactive?

17 A I think they said it's a case-by-case
18 analysis.

19 Q Okay. Now, after that rulemaking, and
20 before we find ourselves here today, there were
21 discussions and negotiations between representatives
22 of certain companies like MTV, RadioSonicNet, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Launch, and representatives of the RIAA, trying to
2 resolve the issue of whether their service could fall
3 within a definition of interactivity that the RIAA
4 could live with, right?

5 A Are you referring to our May discussions?

6 Q Yes.

7 A Yes. In May, we made an overture to you
8 and your clients to sit down and try and figure this
9 out. That's correct.

10 ARBITRATOR VON KANN: May of this year.

11 THE WITNESS: May of this year, yes. And
12 that was -- we did that because we were feeling backed
13 in based on the filings that had been made in this
14 arbitration to have rates set for those types of
15 services, and we thought as well possibly having
16 either this arbitration Panel or the Copyright Office
17 decide what was in and what was out.

18 And we didn't believe that that was
19 appropriate, and we wanted to, instead of just filing
20 something which we ultimately had to, or filing a
21 lawsuit which we ultimately had to, we wanted to sit
22 down and try and discuss this short of litigation,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 which was the way we had approached the entire
2 webcasting industry from the beginning.

3 CHAIRMAN VAN LOON: Hopefully, this time,
4 then, of the overture when you got together to talk
5 might be a good point to take our morning break,
6 before we get into that next section. We're trying to
7 figure out the way to divide up this abbreviated
8 morning equally. So why don't we plan to come back at
9 11:30.

10 (Whereupon, the proceedings in the
11 foregoing matter went off the record at
12 11:16 a.m. and went back on the record at
13 11:33 a.m.)

14 CHAIRMAN VAN LOON: Please resume, Mr.
15 Steintal.

16 MR. STEINTAL: Okay.

17 BY MR. STEINTAL:

18 Q Mr. Marks, are you familiar with the term
19 "servicing" as it's sometimes used in the broadcast
20 radio and webcast radio business?

21 A Yes.

22 Q What do you understand that term to mean?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 A Giving a broadcaster copies of new release
2 product.

3 Q Meaning the record companies providing
4 copies to the broadcaster or webcaster for their
5 broadcast or webcast business?

6 A Right. As part of -- usually new releases
7 is -- yes.

8 Q Are you aware that -- let me put it this
9 way. During the course of your discussions with
10 various webcasters, did it from time to time come up
11 that the webcaster with whom you were speaking desired
12 to be serviced by the RIAA member company?

13 A Yes.

14 Q Did you have sort of a stock answer that
15 you gave them, or did you give them different answers
16 depending on who they were?

17 A I gave them one answer. It's a simple
18 answer. It's their individual decision. You've got
19 to talk to them. And in instances where it was being
20 asked as, gee, if I do this deal, will you get me
21 service, I told them there's no -- I can't make that
22 promise, and that's a link that, you know, we don't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 make. You have to talk to the companies individually.

2 Q From time to time, did you tell webcasters
3 that you could give them the names of people at the
4 labels that they could call about that subject?

5 A I honestly don't know the names of the
6 people at the labels who do the servicing. I may have
7 put them in touch with the people on the Negotiating
8 Committee to do that.

9 Q Now, did it also come to your attention
10 during the course of discussions with webcasters that
11 several of them desired to use sound recordings in a
12 manner that clearly fell outside the scope of the
13 statutory license?

14 A I'm sorry. Could you just repeat that?

15 Q In the course of your discussions with
16 webcasters, did it from time to time come up that the
17 webcasters business model included using sound
18 recordings in a manner not only that fell within the
19 statute but also outside the statute, like music on
20 demand, music videos, or other kinds of activity that
21 would require voluntary licenses?

22 A Yes, both whether we were in discussions

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with them or not. That was an issue that we spoke
2 with many companies about.

3 Q And it's true, is it not, that some
4 webcasters, during the course of discussions with the
5 RIAA, indicated that they hoped that by entering into
6 a deal with the RIAA they might create relationships
7 with the RIAA member companies that would facilitate
8 voluntary license discussions. Isn't that right?

9 A That by doing a deal with us it would
10 facilitate their relationship with them?

11 Q Yes.

12 A You're asking if they told me that?

13 Q That's what I'm asking you.

14 A I think that -- I mean, they may have
15 asked me that, to which I would have said, "We can't
16 give you anything with a statutory license, and we
17 don't make any promises." So, you know, was it an
18 issue at one time or another? I would say yes.

19 Q And by "an issue," what you mean is that
20 at various times companies with whom you were
21 negotiating indicated that they hoped that they would
22 be able to secure voluntary licenses from various RIAA

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 member companies for their non-DMCA-compliant
2 services, right?

3 A We knew that some of our licenses planned
4 to or were offering services in addition to the DMCA-
5 compliant service.

6 Q And my question is --

7 A And, therefore, they -- if they were
8 offering something that required an additional
9 license, that they would need to get that license.

10 Q And did they indicate to you, one step
11 further, that they hoped that after concluding the
12 RIAA webcasting license that they would be able to
13 secure voluntary licenses from the RIAA member
14 companies for those aspects of their model that didn't
15 fall within the statute?

16 A Just -- I don't recall anybody -- any
17 particular webcaster saying, "We hoped that this would
18 happen." And so did they indicate to us? I -- you
19 know, I don't recall anybody saying, "Gee, let's do
20 this deal, and then we really hope we're going to --
21 that this is going to be the jumping off point."

22 Q Well, if they didn't quite say it exactly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that way in connection -- let's just back up a little
2 bit. Did they say that they hoped after doing this
3 deal that they would be able to secure voluntary
4 licenses with the RIAA member companies for their non-
5 DMCA-compliant functionality?

6 A I think that there were some that may have
7 felt that entering into a deal with us would
8 demonstrate that they were a serious player or
9 something along those lines that would help them in
10 the further business relationship with the companies.

11 Q Now, generally speaking, when you are in
12 discussion with a potential statutory licensee, it's
13 fair to say, isn't it, that you preferred that they
14 would take the RIAA license rather than arbitrate,
15 correct?

16 A Yes.

17 Q You were not indifferent in that
18 discussion. You hoped that you would conclude a
19 license, right?

20 A We hoped to negotiate and not arbitrate.

21 Q And part of your job -- I think Mr.
22 Garrett at one point said it's what you did for a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 living for three years -- was to seek to get
2 webcasters licensed, isn't that right?

3 A That wasn't all I did for the three years,
4 but it was certainly part of my job.

5 Q Now, when you went about licensing
6 webcasters, the RIAA was very conscious about using
7 the deals that they were going to do with various
8 webcasters in developing precedent for this CARP.
9 Isn't that true?

10 A No. I think it's -- a better
11 characterization is that we were looking at the deals
12 to develop marketplace precedent, so that it would
13 lead to a marketplace resolution.

14 Q Well, you were familiar with the fact that
15 there was the "willing buyer/willing seller" criteria
16 for establishing fees in the CARP from the very
17 beginning, right?

18 A Absolutely.

19 Q And I'm not sure I understand the
20 difference between what I asked you and what you
21 answered, so I'm going to try it this way. Were you
22 conscious when you went into that marketplace about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 establishing a precedent that you could use as what
2 you would call marketplace evidence for purposes of
3 the CARP?

4 A Let me try and answer it this way. We
5 didn't have our heads in the sand. We knew that there
6 was a possibility that there would be an arbitration,
7 and we realized that any deal we did would be part of
8 that arbitration because of that standard.

9 So we were aware of the arbitration, and
10 we were aware that any deal we would do maybe would be
11 part of the arbitration because any panel that we were
12 going to be in front of would want to see -- and,
13 therefore -- I'll just leave it at that.

14 Q Well, do you dispute the fact that you
15 were actually trying to develop a precedent when you
16 went out into the marketplace?

17 A Yes, I would dispute that.

18 Q Okay.

19 ARBITRATOR VON KANN: You said you were
20 trying to develop marketplace precedent. How could
21 that be, if you're not -- if the players are not
22 allowed to tell one another what rates they got? This

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is all confidential. I don't quite understand how
2 that would develop a marketplace precedent, if that
3 was all secrete.

4 THE WITNESS: Well, what we had hoped was
5 that we would continue to do more and more deals, and
6 that we would be at a point where we could reach an
7 industry resolution as a result of those marketplace
8 deals.

9 So as I may or may not have said before,
10 we -- we didn't tell anybody, "Here's our rate." We
11 didn't put out on our website, "Here's what our rate
12 is," and we didn't tell any particular webcaster with
13 whom we were negotiating that this person did a deal
14 with that, but we certainly let everybody know that we
15 were -- with whom we were speaking what we thought the
16 rates were and that we had done a number of deals that
17 were consistent with those rates.

18 But what we thought was that the more
19 deals you do the more -- the more chance we are going
20 to have of resolving this as part of doing those --
21 doing those deals, and having those as the basis upon
22 which we could go either ourselves to the Copyright

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Office or hand in hand with a group of those with whom
2 we had done the deal for the Copyright Office to
3 propose specific rates.

4 ARBITRATOR VON KANN: Okay.

5 BY MR. STEINTHAL:

6 Q I'm going to follow up on what Judge von
7 Kann asked you there about marketplace precedent a
8 little bit and marketplace deals. You mentioned in
9 response I believe earlier today, to either Mr.
10 Garrett or the Panel, that the licensees -- you
11 couldn't talk about what other licensees' deals were
12 in your negotiations because all your deals had
13 confidentiality clauses. Remember that?

14 A Yes.

15 Q Now, that's a standard term and condition
16 that the RIAA put into each of its licenses, isn't it,
17 the clause that says, "This is very confidential. You
18 can't talk to it about any third parties, but we have
19 the right to use it in the CARP"?

20 A It was an agreed-upon confidentiality
21 provision. Everybody -- most people with whom we
22 negotiated expected it to be there. Many people with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 whom we did deals or -- and even didn't do deals asked
2 us to sign an NDA, because they wanted everything
3 confidential.

4 So it seemed natural and obvious to us
5 that that would be part of a licensing agreement.
6 It's in virtually every licensing agreement that I'm
7 aware of.

8 Q Well, we're going to come to those
9 licensing agreements soon. But you're not going to
10 dispute the fact, are you, that the RIAA drafted that
11 clause, and the RIAA put it in every single one of its
12 proposed licenses with licensees, right?

13 A That was part of our form agreement, so to
14 speak.

15 Q Okay. Now, so that creates the following
16 very interesting dynamic. You're in a negotiation
17 with a webcaster, and you know -- Steve Marks -- you
18 know every single deal you've done, right?

19 A Yes.

20 Q You know what all of the licenses are and
21 whether, you know, you've ever deviated from X percent
22 of revenue or Y cents per performance, right?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A Yes.

2 Q And the licensee doesn't know anyone
3 else's deal, right?

4 A No, similar to most markets for licenses.
5 I mean, I believe that would be the same thing with
6 licenses that webcasters or other internet companies,
7 or any company for that matter, do with our individual
8 members.

9 Q But very unlike competitive marketplaces
10 like where you'd go into a supermarket and everybody
11 gets to see what the price is that people pay for a
12 particular good, right?

13 A There's probably a distinction there.

14 Q And there's a distinction in the knowledge
15 level, isn't there, between you on the one hand
16 knowing all the deals and the licensee on the other
17 basically having to take at face value whatever you
18 tell them about what all your prior deals were, right?

19 A That's right.

20 Q And so when you told licensees, as I think
21 you've said twice today, that you had certain terms
22 that the RIAA's rate was X percent of revenue for a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 percentage deal, or Y cents per performance for a per
2 performance deal, there was no way that the licensee
3 could check that out, could they?

4 A They couldn't -- they didn't have access
5 to our other agreements. So to the extent that we
6 were saying, "Here is the range of rates that we've
7 done our deals in," whether it be per performance or
8 gross revenues, they didn't have a way to verify that.
9 They had to take our word for it.

10 Q Right. And just to be clear, I think what
11 you said earlier today was, it was rather routine for
12 you to tell a prospective licensee, in words similar
13 to, this is what we are getting, when you are talking
14 about a per-performance or percentage of revenue rate,
15 right?

16 A It certainly would come up in
17 negotiations. I mean, often the webcaster would ask
18 how many other licenses have you done or who have you
19 done deals with, and things like that.

20 Q And when you talked about the prior deals,
21 you would essentially -- and I think you used those
22 words earlier today -- say, this is what we're getting

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for per performance, and this is what we're getting
2 for percentage of revenue, right?

3 A Generally, yes.

4 Q And we'll come to it again, but I'm trying
5 to do some of this in public and some of it in
6 private. So I don't want to get too specific. But
7 you'd agree with me, would you not, that there were
8 times when a prospective licensee offered single digit
9 percentages of revenue in response to which you said,
10 we're not going to do that; our deals on a percentage
11 revenue basis are higher than that, right?

12 A We only did deals that we thought were
13 fair value for our copyright owners.

14 Q And as a practical matter, you only did
15 percentage-of-revenue deals, until very recently, that
16 reached at the end of the term the percentage of
17 revenue that you're seeking as part of your proposal
18 on this proceeding, right?

19 A Our proposal is based on the marketplace
20 agreements that we did.

21 Q Well, I guess it depends on whether the
22 glass is half empty or half full. My question was,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 isn't it true that in the end you only did deals that,
2 on a percentage-of-revenue basis, reached the
3 percentage of revenue at the end of the term that is
4 the same percentage you're seeking in this proceeding.

5 A The 15 percent is what we requested in
6 this proceeding, and that's the rate that was in all
7 of our licensing deals.

8 Q And on per performance, with the exception
9 of circumstances where you might have done
10 per-performance rates as an alternative minimum, the
11 fact is that you also had a rate in the range of .35
12 to .4 cents per performance, which is where you ended
13 up at a minimum in all the deals that you did prior to
14 this proceeding, right?

15 (Whereupon, at 11:48 a.m., the proceedings
16 went into Closed Session.)

17
18
19
20
21
22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com